Supreme Court, U.S.
FILED
07-469 OCT 1 - 2007
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

ARMANDO SARIOL, PETITIONER

v.

FLORIDA CRYSTALS CORPORATION, FLORIDA CRYSTALS FOOD CORP., SUGAR FARMS CO-OP

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Eleventh Circuit erred in its ruling in direct conflict with the United States Supreme Court ruling in Farmers Reservoir & Irrigation Co. v. McComb, 337 U.S. 755 (1949), concluding that petitioners activities of delivering fuel for farm machinery for independent contractors were a form of secondary agriculture and thus fell within the agricultural exemption of 29 U.S.C. § 213 (b)(12) for the payment of overtime wages pursuant to 29 U.S.C. § 207(a)(2).

2. Whether the United States Court of Appeals for the Eleventh Circuit erred in its ruling in direct conflict with the United States Supreme Court ruling in Farmers Reservoir & Irrigation Co. v. McComb, 337 U.S. 755 (1949), concluding that Sugar Farms Co-Op was involved in agriculture and thus falls under the exemption of 29 U.S.C. § 213 (b)(12) for the payment of overtime wages pursuant to 29 U.S.C. § 207(a)(2).

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PETITION FOR WRIT OF CERTIORARI

Armando Sariol ("Sariol") petitions for a writ of certiorari to review an opinion and judgment of the U.S. Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Eleventh Circuit, dated July 3, 2007, is officially reported as Sariol v. Florida Crystals Corp. 490 F.3d 1277, and is reproduced at App. 1a- 11a. The decision of the Southern District of Florida is reproduced at App.12a-27a.

JURISDICTION

The petition is timely under 28 U.S.C. §2101(c) and Supreme Court Rule 13.3 because it is being filed within 90 days of the 11th Circuit Court of Appeals affirming the Southern District of Florida's decision granting Defendant's motion for summary judgment.

RELEVANT PROVISIONS INVOLVED

The relevant statutory provisions involved are 29 U.S.C. § 207 (a)(1) of the Fair Labor Standards Act; 29 U.S.C. § 213 (b)(12) Exemptions to Fair Labor Standards Act; (29 U.S.C. 203 (f)) Definitions for the Fair Labor Standards Act; 29 C.F.R. § 780.105 "Primary" and "secondary" agriculture under section 3(f); 29 C.F.R. § 780.158 Examples of other practices within section 3(f) if requirements are met.

Section 207 (a)(1) of the FLSA, maximum hours (29 U.S.C. § 207 (a)(1))

> (a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions.
>
> (1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Section 213 (b)(12) Exemptions (29 U.S.C. § 213 (b)(12))

(b) Maximum hour requirements. The provisions of section 7 [29 USCS § 207] shall not apply with respect to:

> (12) any employee employed in agriculture or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, or operated on a sharecrop basis, and which are used exclusively for supply and storing of water, at least 90 percent of which was ultimately delivered for agricultural purposes during the preceding calendar year.

Section 203 (f) Definitions (29 U.S.C. 203 (f))

(f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15(g) of the Agricultural Marketing Act, as amended [12 USCS § 1141j(g)], the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

Section § 780.105 "Primary" and "secondary" agriculture under section 3(f). 29 C.F.R. § 780.105.

(a) Section 3(f) of the Act contains a very comprehensive definition of the term "agriculture." The definition has two distinct branches (see Farmers Reservoir Co. v. McComb, 337 U.S. 755). One has relation to the primary meaning of agriculture; the other gives to the term a somewhat broader secondary meaning for purposes of the Act (NLRB v. Olaa Sugar Co., 242 F. 2d 714).

(b) First, there is the primary meaning. This includes farming in all its branches. Listed as being included "among other things" in the primary meaning are certain specific farming operations such as cultivation and tillage of the soil, dairying the production, cultivation,

growing and harvesting of any agricultural or horticultural commodities and the raising of livestock, bees, fur-bearing animals or poultry. If an employee is employed in any of these activities, he is engaged in agriculture regardless of whether he is employed by a farmer or on a farm. (Farmers Reservoir Co. v. McComb, supra; Holtville Alfalfa Mills v. Wyatt, 230 F. 2d 398.)

(c) Then there is the secondary meaning of the term. The second branch includes operations other than those which fall within the primary meaning of the term. It includes any practices, whether or not they are themselves farming practices, which are performed either by a farmer or on a farm as an incident to or in conjunction with "such" farming operations (Farmers Reservoir Co. v. McComb, supra; NLRB v. Olaa Sugar Co., 242 F. 2d 714; Maneja v. Waialua, 349 U.S. 254).

(d) Employment not within the scope of either the primary or the secondary meaning of "agriculture" as defined in section 3(f) is not employment in agriculture. In other words, employees not employed in farming or by a farmer or on a farm are not employed in agriculture.

Section 780.158 Examples of other practices within section 3(f) if requirements are met. 29 C.F.R. § 780.158

(a) As has been noted above, the term "agriculture" includes other practices performed by a farmer or on a farm as an incident to or in conjunction with the farming operations

conducted by such farmer or on such farm in addition to the practices listed in section 3(f). The selling (including selling at roadside stands or by mail order and house to house selling) by a farmer and his employees of his agricultural commodities, dairy products, etc., is such a practice provided it does not amount to a separate business. Other such practices are office work and maintenance and protective work. Section 3(f) includes, for example, secretaries, clerks, bookkeepers, night watchmen, maintenance workers, engineers, and others who are employed by a farmer or on a farm if their work is part of the agricultural activity and is subordinate to the farming operations of such farmer or on such farm. (Damutz v. Pinchbeck, 66 F. Supp. 667, aff'd. 158 F. 2d 882). Employees of a farmer who repair the mechanical implements used in farming, as a subordinate and necessary task incident to their employer's farming operations, are within section 3(f). It makes no difference that the work is done by a separate labor force in a repair shop maintained for the purpose, where the size of the farming operations is such as to justify it. Only employees engaged in the repair of equipment used in performing agricultural functions would be within section 3(f), however; employees repairing equipment used by the employer in industrial or other nonfarming activities would be outside the scope of agriculture. (Maneja v. Waialua, 349 U.S. 254.) The repair of equipment used by other farmers in their farming operations would not qualify as an agricultural practice incident to the farming operations of the

farmer employing the repair workers.

(b) The following are other examples of practices which may qualify as "agriculture" under the secondary meaning in section 3(f), when done on a farm, whether done by a farmer or by a contractor for the farmer, so long as they do not relate to farming operations on any other farms: The operation of a cook camp for the sole purpose of feeding persons engaged exclusively in agriculture on that farm; artificial insemination of the farm animals; custom corn shelling and grinding of feed for the farmer; the packing of apples by portable packing machines which are moved from farm to farm packing only apples grown on the particular farm where the packing is being performed; the culling, catching, cooping, and loading of poultry; the threshing of wheat; the shearing of sheep; the gathering and aling of straw.

(c) It must be emphasized with respect to all practices performed on products for which exemption is claimed that they must be performed only on the products produced or raised by the particular farmer or on the particular farm (Mitchell v. Huntsville Nurseries, 267 F. 2d 286; Bowie v. Gonzalez, 117 F. 2d 11; Mitchell v. Hunt, 263 F. 2d 913; NLRB v. Olaa Sugar Co., 242 F. 2d 714; Farmers Reservoir Co. v. McComb, 337 U.S. 755; Walling v. Peacock Corp., 58 F. Supp. 880; Lenroot v. Hazelhurst Mercantile Co., 153 F. 2d 153; Jordan v. Stark Bros. Nurseries, 45 F. Supp. 769).

STATEMENT

Sugar Farms Co-Op grows the sugar cane and then assigns different tracks of land to be harvested by various independent sugar farming companies that harvest the cane and take it to independent mills. Sugar Farms Co-Op does only a small percentage of the harvesting of the land upon which it grows the cane.[1] Sugar Farms Co-Op subcontracts the planting of the cane to several different companies.[2] After the fields are planted by Sugar Farms Co-Op and the independent growers, the mills send their workers to harvest the same cane and take it away.[3] The harvesting of the cane has nothing to do with growing it: each function is separate and done by different companies.[4] The cane is grown by Sugar Farms Co-Op to be harvested by the employees of the independent mills.[5] Sugar-Farms Co-Op employs between 220 and 300 people.[6] Out of the Sugar Farms Co-Op entire workforce, only 12 employees of Sugar Farms Co-Op actually perform harvesting work.[7] The cane that is planted by Sugar Farms Co-Op is already fully grown when it is planted.[8] Sugar Farms plants some cane already grown by The USDA.[9] The rest of the cane planted by Sugar Farms is already fully grown when it

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[1] Fanjul deposition P.38, L.1-25, P. 39, L.1-2
[2] Fanjul deposition P.39, L.19-25
[3] Fanjul deposition P.40, L.1-25
[4] Fanjul deposition P.41, L.1-15
[5] Fanjul deposition P.41, L.5-12
[6] Sariol v. Fla. Crystals Corp., 490 F.3d 1277, 1278
[7] Fanjul deposition P.42, L.1-9
[8] Fanjul deposition P.44, L.8-22
[9] Fanjul deposition P.45

is planted.[10] The USDA plants its own fully grown cane at Sugar Farms Co-Op.[11]

Sugar Farms Co-Op provides harvesting work for various companies such as NEW HOPE, VANDERGRIFT, NEW FARMS, CLOSTER FARMS, AND SOUTH FLORIDA INDUSTRIES, ADRIENNE SUGAR CANE FARMS , KENDALL SUGAR CANE FARMS, ST. LUCIE RIVER AND STOFIN, INC.[12] Each of the above named companies pays for or contributes to Sugar Farm Co-op business operations on a per acreage basis.[13] Florida Crystals Corp. invoices each of the companies listed above for the work performed by the employees of Sugar Farms Co-Op.[14] Each of the companies listed above reimburses Sugar Farms Co-Op for the work performed by the employees of Sugar Farms Co-Op, as well as for the materials consumed.[15] Over the past (4) years, the various companies listed above who receive services performed by Sugar Farms Co-Op pays Florida Crystals Corp. a fee to manage Sugar farms Co-op on a yearly basis.[16] The farms listed above pay Sugar Farms Co-op for its employee's work so that they can perform the farming operations for these various farms.[17] Nobody employed by Sugar Farms Co-Op is allowed to access the funds or the bank account to

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[10] Fanjul deposition P.46, L.3-8, P.48
[11] Fanjul deposition P.46, L.22-24
[12] Oscar Hernandez deposition P.24, L.1-25
[13] Oscar Hernandez deposition P.25, L.1-23
[14] Oscar Hernandez deposition P.28, L.1-25, P.29, L.1-8
[15] Oscar Hernandez deposition P.32, L.7-18, P.34, L.2-9
[16] Oscar Hernandez deposition P.33, L.5-8, P.36, L.5-12
[17] Oscar Hernandez depo. P.39, L.9-14

which the funds are paid by the various farms that receive the services of Sugar Farms Co-op.[18]

Petitioner, Sariol, was one of the service truck operators who weekly and regularly delivered the fuel to the independent contractors on a daily basis which included filling their 500 gallon tanks as well as fueling the machinery of the independent contractors.[19] All of Sugar Farms service vehicle operators provided fuel for the farm operation which included providing fuel for the independent contractors.[20] J&J Harvesting, J&H harvesting and Roma Services independent contractors were within the harvesting unit that Sariol serviced.[21] Additional independent contractors included TIGA, who were used to help in the planting, as well as a company named RE MOTES and ROMA SERVICES to do the fertilizing and herbicide application for Sugar Farms.[22]

J&J Harvesting brings its own harvesters, tractors, and wagons to harvest the cane at Sugar Farms CO-Op.[23] ROMA SERVICES AND RE-MOTES bring their own equipment onto the land harvested by Sugar Farms Co-Op, in order to perform harvesting functions.[24] Sugar Farms Co-Op provides fuel, via Sugar Farm employees, for the machinery owned and utilized by the independent contractors.[25] Sugar Farm

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[18] Oscar Hernandez depo. P.40, L.1-19
[19] Ulloa deposition P.51, L.6-P.52, L.20
[20] Ulloa deposition P.56, L.10 to 18
[21] Ulloa deposition P.57, L.13-25, P.58, L.1-15
[22] Ulloa deposition. P.18, L.3
[23] Ulloa deposition P.22, L.10-19, P.23, L.21-23
[24] Ulloa deposition P.34, L.19 to P.35, L.6
[25] Ulloa deposition P.38, L.3-21

employees provide fuel to the tanks owned by the independent contractors and directly into the machinery owned and utilized by the independent contractors.[26] Sugar Farms employees fill the tanks owned and utilized by J&J Harvesting for their harvesting equipment.[27] J&J Harvesting's tanks are filled about every other day or more often with fuel by Sugar Farms employees.[28] Sugar Farms employees also provide fuel to the tanks and/or machinery owned by the other independent contractors such as ROMA and RE-MOTES AND TIGA.[29] Diesel fuel is provided to the independent contractors on a daily basis by employees of Sugar Farms Co-Op.[30] The independent contractors are located as much as 45 minutes away from where the diesel fuel is stored at Sugar Farms Co-op.[31] The tanks owned by J&J Harvesting and J&H Harvesting are 500 gallon capacity that are filled by Sugar Farms Co-Op employees.[32] J&J Harvesting and J&H Harvesting own their 500 gallon tanks.[33]

The Magistrate Judge granted summary judgment in favor of Sugar Farms Co-Op, finding that Sariol's overtime claim was exempt under the agricultural exemption found at 29 USC 213. On appeal to the U.S. Court of Appeals for the Eleventh Circuit, the ruling of the Magistrate Judge was affirmed.

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[26] Ulloa deposition P.38, L.23 to P. 39, L.8
[27] Ulloa depo. P.40, L.15-23
[28] Ulloa depo. P.40, L.23- P.41, L.8
[29] Ulloa depo. P.41, L.23 TO P. 42, L.25
[30] Ulloa depo. P.42, L.25 to P.43, L.9, P.49, L.16-24
[31] Ulloa depo. P.46, L.1-21
[32] Ulloa depo. P.49, L.1-15
[33] Ulloa depo. P.50, L.11-17

REASONS FOR GRANTING THE PETITION

I. DELIVERING FUEL FOR FARM MACHINERY IS NOT A FORM OF SECONDARY AGRICULTURE AND THUS DOES NOT FALL WITHIN THE AGRICULTURAL EXEMPTION OF 29 U.S.C. § 213 (B)(12) FOR THE PAYMENT OF OVERTIME WAGES PURSUANT TO 29 U.S.C. § 207.

Pursuant to 29 U.S.C. Sec.207(a)(1), workers are entitled to one and one half times their regular hourly rate for any hours worked per week in excess of forty hours. However, the FLSA exempts certain industries, including agriculture, from this requirement. 29 U.S.C. § 213(b)(12).

There are two types of agricultural activity: primary and secondary. *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 760-63 (1949). Primary agriculture includes such specific practices as cultivation, tillage of the soil, growing and harvesting of any agriculture. Secondary agriculture has a broader meaning. It is defined to include things other than primary agricultural activities, which are performed either by a farmer or on a farm, incidental to or in conjunction with "such" farming operations. *Id; see also* 29 C.F.R. §§ 780.105, 780.158. To meet the secondary agriculture definition, the activity must satisfy two criteria: it must be performed either by a farmer on a farm and it must be incidental to or in conjunction with farming operations.

There are two types of agricultural activity: primary and secondary. *Farmers Reservoir &*

Irrigation Co. v. McComb, 337 U.S. 755, 760-63 (1949). Primary agriculture includes such specific practices as cultivation, tillage of the soil, growing and harvesting of any agriculture. Secondary agriculture has a broader meaning. It is defined to include things other than primary agricultural activities, which are performed either by a farmer or on a farm, incidental to or in conjunction with "such" farming operations. *Id; see also* 29 C.F.R. §§ 780.105, 780.158. To meet the secondary agriculture definition, the activity must satisfy two criteria: it must be performed either by a farmer on a farm and it must be incidental to or in conjunction with farming operations.

The question at hand is whether providing fuel to independent contractors working on a farm is considered incidental or in conjunction with farming operations. On appeal The Eleventh Circuit ruled that Sariol's work was exempt, a direct conflict with the United States Supreme Court ruling in *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 760 (1949) which stated:

> Agriculture, as an occupation, includes more than the elemental process of planting, growing and harvesting crops. There are a host of incidental activities which are necessary to that process. Whether a particular type of activity is agricultural depends, in large measure, upon the way in which that activity is organized in a particular society. The determination cannot be made in the abstract. In less advanced societies the agricultural function includes many types of activity which,

in others, are not agricultural. The fashioning of tools, the provision of fertilizer, the processing of the product, to mention only a few examples, are functions which, in some societies, are performed on the farm by farmers as part of their normal agricultural routine. Economic progress, however, is characterized by a progressive division of labor and separation of function. Tools are made by a tool manufacturer, who specializes in that kind of work and supplies them to the farmer. The compost heap is replaced by factory-produced fertilizers. **Power is derived from electricity and gasoline rather than supplied by the farmer's mules.** Wheat is ground at the mill. In this way, functions which are necessary to the total economic process of supplying an agricultural product become, in the process of economic development and specialization, separate and independent productive functions operated in conjunction with the agricultural function but no longer a part of it. Thus, the question as to whether a particular type of activity is agricultural is not determined by the necessity of the activity to agriculture nor by the physical similarity of the activity to that done by farmers in other situations. The question is whether the activity in the particular case is carried on as part of the agricultural function or is separately organized as an independent productive activity. The farmhand who cares for the farmer's mules or prepares his fertilizer is engaged in agriculture. But the maintenance man in a power plant and the packer in a fertilizer

> factory are not employed in agriculture, even if their activity is necessary to farmers and replaces work previously done by farmers. **The production of power and the manufacture of fertilizer are independent productive functions, not agriculture.**

[Emphasis added].

Sariol, as one of the service truck operators who weekly and regularly delivered the fuel to the independent contractors on a daily basis which included filling their 500 gallon tanks as well as fueling the machinery of the independent contractors. This act of filling the machinery and 500 gallon tanks with fuel is clearly an independent productive function and is not incidental to or in conjunction with the farming operations as outlined in *Farmers Reservoir & Irrigation Co.*, at 760.

Therefore, if Sariol's conduct was not incidental to or in conjunction with farming, than for the purposes of 29 U.S.C. § 213(b)(12), Sariol cannot be deemed to be an exempt agricultural employee and thus should not be exempt from the payment of overtime wages.

In sum, the fueling of machines and tanks that were ultimately used for agriculture, are not incidental to or in conjunction with farming operations and should thus not be exempt under 29 U.S.C. § 213(b)(12) as an exemption to the Fair Labor Standards Act.

II. Sugar-Farms Co-Op cannot be considered "a farmer" under the statutory definition and case law interpreting the same and, thus, cannot enjoy the agricultural exemption to the Fair Labor Standards Act.

Sugar Farms Co-Op is a cooperative association that was created by farmers as a separate corporation. This is evident through the following facts. Sugar Farms Co-Op does not own any of the land that it harvests.[34] Sugar Farms Co-Op has no annual revenue.[35] Sugar Farms Co-Op provides harvesting work for various companies such as NEW HOPE, VANDERGRIFT, NEW FARMS, CLOSTER FARMS, AND SOUTH FLORIDA INDUSTRIES, ADRIENNE SUGAR CANE FARMS, KENDALL SUGAR CANE FARMS, ST. LUCIE RIVER AND STOFIN, INC.[36] Each of the above named companies pays for or contributes to Sugar Farm Co-Op business operations on a per acreage basis.[37] Florida Crystals Corp. invoices each of the companies listed above for the work performed by the employees of Sugar Farms Co-Op.[38] Each of the companies listed above reimburses Sugar Farms Co-Op for the work performed by the employees of Sugar Farms Co-Op, as well as for the materials consumed.[39] Over the past (4) years, the various companies listed above who receive services performed by Sugar Farms Co-Op pays Florida Crystals Corp. a fee to manage Sugar farms Co-

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[34] Ulloa deposition P.8, L.11-17, P.8, L.3-7, P.16, L.13-16
[35] Oscar Hernandez deposition P.33, L.20-25
[36] Oscar Hernandez deposition P.24, L.1-25
[37] Oscar Hernandez deposition P.25, L.1-23
[38] Oscar Hernandez deposition P.28, L.1-25, P.29, L.1-8
[39] Oscar Hernandez deposition P.32, L.7-18, P.34, L.2-9

op on a yearly basis.[40] The farms listed above pay Sugar Farms Co-op for its employee's work so that they can perform the farming operations for these various farms.[41] Nobody employed by Sugar Farms Co-Op is allowed to access the funds or the bank account to which the funds are paid by the various farms that receive the services of Sugar Farms Co-Op.[42]

The case at hand is factually similar to the Farmers Reservoir case decided by the United States Supreme Court in *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755 (1949). In Farmers Reservoir, an argument was made that the company in question was merely a formal conduit or agent, by which the farmers cooperatively operate their common water supply system and cooperatively employ the men. The men are, therefore, said to be farmers because they are said to be employed by farmers. The Supreme Court went on to find the following:

> There is a difference between the hiring of mutual servants by a group of employers and the **creation by them of a separate business organization,** with its own officers, property, and bonded indebtedness, which in turn hires working men. **Those working men are in no real sense employees of the shareholders of the organization**. They are hired by the organization, fired by the organization, controlled and directed by the organization, and paid by it. The fact that the organization is a

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[40] Oscar Hernandez deposition P.33, L.5-8, P.36, L.5-12

[41] Oscar Hernandez deposition P.39, L.9-14

[42] Oscar Hernandez deposition P.40, L.1-19

> corporate one adds to the picture but is not controlling. **The controlling fact is that the company has been set up by the farmers as an independent entity** to operate an integrated, unitary water supply system. **The function of supplying water has thus been divorced by the farmers from the farming operation** and set up as a separate and self-contained activity in which the farmers are forbidden, by the company's by-laws, to interfere. **Those employed in that activity are employed by the company, not by the farmers who own the company.** The fact that the company is not operated for profit is immaterial. It is nonetheless the employer.

Id. at 768, 769 [Emphasis added].

The facts in Farmers Reservoir are similar to the case at hand in the aspect that both cases involve a cooperative that was created and set up by farmers as an independent entity to operate an integrated or essential part of farming. In Farmers Reservoir it is undisputed that a farm cannot function and would cease to exist without the supply of water, yet the Supreme Court found these employees of the cooperative not to be farmers. Similar to the case at hand, it is undisputable that Sugar Farms Cooperative supplies workers for aforementioned companies listed above, and if they worked directly for farmers on a farm they should be exempt. Nevertheless, it is beyond contestation that Sugar Farms Cooperative was created as separate entity, and that Sugar Farms Cooperative is the one that employs these employees and not the actual farmers or the companies such as

New Hope, Vandergrift, New Farms, Closter Farms, South Florida Industries, Adrienne Sugar Cane Farms, Kendall Sugar Cane Farms, St. Lucie River and Stofin, Inc. Therefore, as an independent entity Sugar Farms Cooperative should not and cannot be considered a farmer and therefore their employees cannot be considered farmers for the purpose of 29 U.S.C. § 213(b)(12) exemptions. These employees are merely employees of Sugar Farms Cooperative, and not farmers.

Additionally, even if Sugar Farms Cooperative is considered a farmer for the purpose of the exemption of 29 U.S.C. § 213(b)(12), it should not include all the employees of Sugar Farms Cooperative, specifically the fuel delivery drivers, as they are not considered farmers and their work is not incidental to or in conjunction with farming operations pursuant to *Farmers Reservoir & Irrigation Co.*, at 760 and as outlined in Petitioners first argument.

CONCLUSION

The petition should be granted for the above reasons.

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(any footnotes trail end of each document)

No. 06-11370

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ARMANDO SARIOL,
Plaintiff-Appellant,

Versus

FLORIDA CRYSTALS CORPORATION, FLORIDA CRYSTALS FOOD CORP., SUGAR FARMS CO-OP,
Defendants-Appellees.

July 3, 2007, Decided

July 3, 2007, Filed

COUNSEL: For Sariol Armando, Appellant: Zidell, Jamie H., J.H. Zidell, P.A., MIAMI BEACH, FL.

For Florida Crystals Corporation, Appellee: Davis, Norman, Squire, Sanders & Dempsey LLP, MIAMI, FL.

JUDGES: Before TJOFLAT, FAY and SILER, * Circuit Judges.

OPINION BY: Eugene E. Siler, Jr.

OPINION

SILER, Circuit Judge:

Armando Sariol appeals from a grant of summary judgment in favor of Florida Crystals Corporation, Florida Crystals Food Corporation, and Sugar Farms Co-op (collectively "Defendants") on his Fair Labor Standards Act ("FLSA") claim for overtime compensation, 29 U.S.C. § 207. The magistrate judge, sitting by the parties' consent, entered summary judgment based on the FLSA's agriculture exemption, 29 U.S.C. § 213(a)(6), finding that Sariol, who operated a service truck delivering fuel on Sugar Farms Co-op's sugar cane and rice fields, was involved in a form of secondary agriculture. We AFFIRM.

BACKGROUND

Sugar Farms Co-op is organized as an agricultural cooperative association under Florida law. It engages in farming operations, including the planting and cultivation of sugar cane and rice, but does not undertake any marketing, processing, or milling of its agricultural products. The land making up the farm is owned by a number of different entities that pay the cooperative to carry on the farming operations. Sugar-Farms Co-op employs between 220 and 300 people, and uses independent contractors to supplement the work of its employees. Overall, the contractors perform only a small fraction of the agricultural work as compared to the regular employees.

Sariol worked directly for Sugar Farms Co-op, delivering fuel for farm machinery and performing maintenance and repair services on farm equipment. Florida Crystals Corporation and Florida Crystals Food Corporation were alleged to be joint employers of Sariol. As part of his work for Sugar Farms Co-op,

Sariol delivered fuel to machinery owned and operated by independent contractors who provided services such as planting, fertilizing, herbiciding, and harvesting during peak times in the growing season. Sugar Farms Co-op purchased all the fuel used on the farm and furnished contractors with fuel as part of their compensation. Sariol worked on the farm itself and did not provide any off-site services. All of his duties, whether provided to fellow employees or independent contractors, were part of the operations at Sugar Farms Co-op.

In 2002, Sariol filed this action against the Defendants, alleging violations of the FLSA for missed overtime pay. The Defendants each filed separate motions for summary judgment claiming that the FLSA's agriculture exemption precluded Sariol from receiving overtime pay. The magistrate judge agreed and granted summary judgment in favor of the Defendants on this ground.

DISCUSSION

We review a grant of summary judgment *de novo*, applying the same legal standards as the court below, and viewing all facts and reasonable inferences drawn therefrom in the light most favorable to the non-moving party. *Johnson v. Booker T. Washington Broad. Serv., Inc.*, 234 F.3d 501, 507 (11th Cir. 2000).

Under the FLSA's overtime wage provision, covered employees must be paid at least one and one-half times the regular rate at which they are employed for hours worked in excess of forty hours. 29 U.S.C. § 207(a)(2). This provision does not cover all employees, however,

as the FLSA expressly exempts those workers "employed in agriculture." 29 U.S.C. § 213(a)(6). The FLSA, in turn, defines "agriculture" to include

> farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities . . . and any practices (including forestry or lumbering operations) performed by a farmer or on a farm as incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

29 U.S.C. § 203(f).

The United States Supreme Court has construed this statutory definition as providing for two categories of exempt agricultural practices. *See Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 762-63, 69 S. Ct. 1274, 93 L. Ed. 1672 (1949). The first half of the definition covers what the Court referred to as "primary" agriculture, which includes specific activities like cultivation and tillage of the soil, dairying, and harvesting. *Id.* at 762. The latter half of the definition, according to the Court, has a "broader" meaning that "includes any practices, whether or not themselves farming practices, which are performed either by a farmer on a farm, incidentally to or in conjunction with 'such' farming operations." *Id.* at 762-63. Later courts have characterized this distinction as one between "primary agriculture" and "secondary agriculture." *See Marshall v. Gulf & W. Indus., Inc.*, 552 F.2d 124, 126 (11th Cir. 1977).

We agree with the district court that Sariol's job duties were a form of secondary agriculture. Numerous courts have found similar activities to come within the agriculture exemption. For instance, the Supreme Court has held that employees who transported workers and supplies to an employer's sugar cane fields were engaged in agriculture, and thus covered by the exemption, as were those who repaired and serviced equipment necessary to the farming operations. *Maneja v. Waialua Agr. Co.*, 349 U.S. 254, 260-64, 75 S. Ct. 719, 99 L. Ed. 1040 (1955). Flying a crop-dusting airplane, cooking for field workers, or even clerical work can be considered agriculture for purposes of the exemption if done by a farmer or on a farm and incidentally or in conjunction with such farming operations. *See Brennan v. Sugar Cane Growers Coop. of Fla.*, 486 F.2d 1006, 1010-11 (5th Cir. 1973); *Hodgson v. Ewing*, 451 F.2d 526, 529 (5th Cir. 1971); *Boyls v. Wirtz*, 352 F.2d 63, 63 (5th Cir. 1965).[1]

Delivering fuel to farm machinery and maintaining equipment are, as the district court concluded, not only incidental to Sugar Farms Co-op's operations, but are absolutely necessary. Without these services, which were provided both to the Sugar Farms Co-op employees and its independent contractors, the farm would grind to a halt. As a result, Sariol's activities clearly qualify as a form of secondary agriculture.[2]

Nevertheless, there are limits to the breadth of the secondary agriculture exemption. It is clear from the statutory definition itself that such work must be performed either by a farmer or on a farm, and that it must be related to the operations of the very farm on which the employee works. In *Mitchell v. Huntsville*

Wholesale Nurseries, Inc., 267 F.2d 286, 290 (5th Cir. 1959), for example, the employer qualified as a farmer because it owned and operated a nursery that grew, cultivated, and sold its own products. However, the nursery could not claim the exemption for employees who spent their time processing nursery stock received from other farms. *Id.* To be eligible for the exemption, "the practices in question must relate to the farmer's own farming operations and not to the farming operations of others." *Id.* Otherwise, the court reasoned, the practices would be "incidental to, or in conjunction with, the farming operation of the other farmers and not incidental to, or in conjunction with, farming operation of the farmers on whose premises the processing is done." *Id.* Seizing upon this language, Sariol argues first that the portion of his time spent delivering fuel to independent contractors is related to the "farming operations of others" and therefore not exempt.[3] Second, and alternatively, he argues that cooperative associations like Sugar Farms Co-op are barred from claiming the agricultural exemption. Neither contention has merit.

For Sariol's first argument to succeed, we would have to agree that independent contractors constitute their own separate "farming operations." Taking a snippet of the Court's language in *Farmers Reservoir*, he argues that the independent contractors are "separately organized as an independent productive activity." *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 761, 69 S. Ct. 1274, 93 L. Ed. 1672 (1949). He cites the fact that the independent contractors are responsible for their own workforce and equipment (except for fuel, of course). This language from *Farmers Reservoir*, however, deals only with the problem of

distinguishing agricultural from nonagricultural activities. There is no such problem here. As we noted above, Sariol's job duties clearly qualify as secondary agriculture. *Farmers Reservoir* simply does not speak to the issue of whether the work of independent contractors can be considered separate farming operations.

Two sources of authority support the commonsense view that independent contractors do not make up their own separate operations. First, the Department of Labor's regulation explaining the agriculture exemption reveals that Congress intended independent contractors to be treated like other agricultural employees:

> The legislative history makes it plain that this language was particularly included to make certain that *independent contractors* such as threshers of wheat, who travel around from farm to farm to assist farmers in what is recognized as a purely agricultural task and also to assist a farmer in getting his agricultural goods to market in their raw or natural state, should be included within the definition of agricultural employees.

29 C.F.R. § 780.128 (emphasis added) (quoting *Bowie v. Gonzalez*, 117 F.2d 11, 18 (1st Cir. 1941)). Because the agricultural activities of independent contractors, like those of employees, are exempt, it would be senseless to draw a distinction between secondary agricultural services provided to one but not the other, as Sariol asks us to do. That contractors are to be treated like employees also demonstrates that, under Congress's understanding, contractors hired by farms do not carry on their own separate farming operations.

Second, in deciding whether a subsidiary or its parent company would be considered a "farmer" for purposes of the exemption, we placed great weight on the subsidiary's "independence in decision-making." *Marshall v. Gulf & W. Indus., Inc.*, 552 F.2d 124, 126 (11th Cir. 1977). In *Marshall*, we held that the subsidiary, because it "owned all crops planted, grown, and harvested," therefore had "control over the farming operations." *Id.* This independence and control meant that only the subsidiary, not the parent company, could claim the exemption. *Id.* By contrast, independent contractors do not control the farming operations. They perform discrete functions at the behest and control of the farm operator, here Sugar Farms Co-op. Therefore, the work of the contractors cannot be viewed as separate operations, and the time Sariol spent delivering fuel to the contractors was covered by the exemption. [4]

Sariol's second argument is that Sugar Farms Co-op cannot qualify as a "farmer" under the exemption definition because it is a cooperative association. Sariol relies solely on the *Farmers Reservoir* decision, in which the Court held that the employees of an irrigation cooperative were not engaged in the practice of agriculture, even though the cooperative had been created and was owned by farmers. *Farmers Reservoir*, 337 U.S. at 768-69. The Court reasoned:

The controlling fact is that the company has been set up by the farmers as an independent entity to operate an integrated, unitary water supply system. The function of supplying water has thus been divorced by the farmers from the farming operation and set up as a separate and self-contained activity in which the

farmers are forbidden, by the company's by-laws, to interfere. Those employed in that activity are employed by the company, not by the farmers who own the company.

Id. at 768. Looking to the legislative history of the exemption, the Court also stated that "[t]he debate in both Houses shows a clear awareness that the employees of farmers cooperative associations would not be exempted as employees of farmers." *Id.* at 769 n.19.

Sariol interprets this case as precluding all cooperative associations from claiming the exemption. However, it is clear that *Farmers Reservoir* stands for the more limited proposition that employees of agricultural cooperatives are employed by the cooperative and not by the farmers who create and own the cooperative. To determine whether the exemption applies, courts must look to the activities of the cooperative; the mere fact that it is owned by farmers will not suffice. In other words, it is not the form of the organization, but its activities. In *Farmers Reservoir*, the Court found that the irrigation cooperative was not engaged in agriculture. Here, Sugar Farms Co-op clearly is.

Sariol also directs our attention to the Department of Labor's regulations, which note that "employees of a farmers' cooperative association are not generally engaged in any practices performed 'by a farmer' within the meaning of section 3(f)." 29 C.F.R. § 780.133(a) (citing *Farmers Reservoir*). This regulation merely restates the rule from *Farmers Reservoir*. In fact, the next subsection clarifies that

[i]t is possible that some farmers' cooperative associations may themselves engage in actual farming operations to an extent and under circumstances sufficient to qualify as a "farmer." In such case, any of their employees who perform practices as an incident to or in conjunction with such farming operations are employed in "agriculture."

29 C.F.R. § 780.133(b).

Sugar Farms Co-op, which without doubt engages in "actual farming operations," is just the type of cooperative association envisioned by subsection (b). There is no merit to Sariol's contention that all cooperative associations are ineligible for the exemption, and Sugar Farms Co-op is clearly one cooperative that is eligible.

AFFIRMED.

---------- Footnotes ----------

*The Honorable Eugene E. Siler, Jr., United States Circuit Judge for the Sixth Circuit, sitting by designation.

1In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), we adopted as binding precedent all [*6] of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

2Some of the harvesting work was performed by independent contractors from local sugar cane millers who then transported the cane to the mill. In *Wirtz v.*

Osceola Farms Co., 372 F.2d 584, 589 (5th Cir. 1967), we held that the hauling of raw cane to a mill was incidental to *milling*, not farming, taking it outside the agriculture exemption. Here, however, Sariol's delivery of fuel to the contract harvesters is incidental to the primary agricultural activity of "harvesting," *see* 29 U.S.C. § 203(f), qualifying his work as an exempt secondary activity. *Wirtz* itself recognized this distinction in holding that other drivers who transported laborers and supplies for purposes of the harvesting were exempt. *Wirtz*, 372 F.2d at 589.

3Although Sariol spent the majority of his time delivering fuel to and servicing Sugar Farms Co-op's equipment, both parties agree that any time spent during the workweek on nonexempt activities would vitiate the exemption for the entire week. *See Skipper v. Superior Dairies, Inc.*, 512 F.2d 409, 411 (5th Cir. 1979).

4Central to our holding is that Sariol spent all of his time on the Sugar Farms Co-op operation, satisfying the separate requirement under the exemption that secondary agricultural activities be performed "by a farmer or on a farm." 29 U.S.C. § 203(f). Sariol's arguments from cases where the exemption was denied for employees who worked off the farm are therefore inapposite.

Filed: 1/27/2006

CASE NO. 02-23662-CIV-GOLD/SIMONTON
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

ARMANDO SARIOL,
Plaintiff,

v.

FLORIDA CRYSTALS CORPORATION, FLORIDA CRYSTALS FOOD CORPORATION, and SUGAR FARMS COOP,
Defendants.

CONSENT CASE

ORDER GRANTING DEFENDANTS' PENDING MOTIONS FOR SUMMARY JUDGMENT

Presently pending before the Court are the Motions by Defendants, Sugar Farms Co-op for Final Summary Judgment (DE # 71, filed 1/16/04), Florida Crystals Corporation and Florida Crystals Food Corporation For Final Summary Judgment (DE # 74, filed 11/16/04), Plaintiff's Motion For Summary Judgment Against Sugar Farms Co-op and Florida Crystals Corporation (DE # 86, filed 8105104), Plaintiff's Motion To Set Jury Trial (DE # 103, filed 11130145). Pursuant to the consent of the parties, the Honorable Alan S. Gold, United States District Judge, has referred this case to the undersigned Magistrate Judge for final disposition (DE # 42). All of these motions are fully briefed (DE ## 72, 75, 88, 89, 90, 91,

96, 97, 98) and have been thoroughly reviewed.

FACTUAL AND PROCEDURAL BACKGROUND

On December 26, 2002, Armando Sariol filed this action against Sugar Farms Coop, Florida Crystals Corporation, and Florida Crystals Food Corporation (DE #1) alleging violations of the Fair Labor Standards Act ("FLSA"). All parties moved for Summary Judgment in 2003 (DE ## 9, 11, 29) but all motions were denied without prejudice as being premature (DE # 65). Discovery has progressed and this case is now ripe for Summary Judgment.

Armando Sariol worked at Sugar Farms Co-op primarily as a service truck operator delivering fuel to machinery located on Sugar Farms, and servicing that machinery. (Sariol Aff.; Ulloa Depo. p 51). Some of the equipment Sariol provided fuel for was owned and operated by Sugar Farms, other equipment was owned and operated by contractors, but all equipment was located on Sugar Farms property. (Sariol Aff.; Ulloa Depo. pp 51-53). Sariol was not employed by any of the independent contractors, in fact, Sugar Farms employees, like Sariol, only work on Sugar Farms Co-op property and do not provide any outside services. (Sariol Aff.; Ulloa Depo. pp 1-8, 53). Sariol's jobwas to provide fuel as well as maintenance services, such as greasing and changing the oil and air filters, to farming equipment located on Sugar Farms Property regardless of whether the equipment was being operated by Sugar Farms employees or independent contractor's employees. (Sariol Aff.; Ulloa Depo. p 53).

Sugar Farms is organized as an agricultural cooperative association pursuant to Florida Statutes Chapter 618. (Ulloa Aff.). Sugar Farms is only engaged

in farming operations, it does not do any marketing, processing or milling. (Ulloa Aff.). The land that makes up Sugar Farms Co-op is owned by a variety of different owners. (Ulloa. Depo. pp 5-6, Tabernifa Depo. p 15). The land owners pay the cooperative to provide all of the farming services. (Tabernilla, Depo. p 29). "Sugar Farms is basically a farming operation and its just in charge of, you know, plowing the fields and planting and cultivating and spraying for herbicides and diseases." (Funjul[1] Depo. p 42). Sugar Farms Co-op employs between 220-300 people. (Ulloa Depo pp 5,14). Sugar Farms uses it's own employees, and independent contractors seasonally, for harvesting, planting, fertilizing, and herbiciding. (Ulloa Depo. pp 19-20, 30, 32-33). Independent contractors perform only a small fraction of the total agricultural work done at Sugar Farms. (Ulloa Depo. p 68). During the off season, contractors are not used and Sugar Farms employees handle a variety of other farming tasks. (Ulloa Depo. pp 78-79). All of Sariol's job duties, including driving a service truck, tractor, or repairing equipment, took place on Sugar Farms property and were part of the agricultural farming operations of Sugar Farms. (Ulloa Aff.; Sariol Aff.; Ulloa Depo. pp 7-8, 45, 53).

Sugar Farms' operation included all aspects of farming from planting to harvesting before sending to a mill.[2] Each year Sugar Farms would acquire the types of sugar cane stalks that it wanted to harvest. (Funjul Depo. pp 44-55). Sometimes Sugar Farms would make seeds from its existing stalks that had grown the previous year. (Funjul Depo. pp 44-55). Other times Sugar Farms would buy stalks from other growers or the USDA to make seeds so it could grow a different variation of sugar cane. (Funjul Depo. pp 44-55). Sugar cane is cultivated by first preparing the land, then

taking fully grown stalks, cutting them into small pieces (seeds), planting them, clearing and maintaining the rows between the cane, monitoring for pests and disease, and fertilizing. The stalks are fully grown in approximately one year, after which they are harvested. (Funjul Depo. pp 53-55).

LEGAL ANALYSIS

1. Summary Judgment Standard

Rule 56(c) of the Federal Rules of Civil Procedure authorizes entry of summary judgment where the pleadings and supporting materials show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Anderson. v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Denney v. City of Albany, 247 F.3d 1172, 1181 (11th Cir. 2001). Summary judgment is an Integral part of the federal rules as a whole, which are designed to secure a just, speedy, and inexpensive determination of every action. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). The court's focus in reviewing a motion for summary judgment is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Allen v. Tyson Foods Inc., 121 F.3d 642, 646 (11th Cir.1997). In assessing whether the movant has met its burden, the courts should view the evidence and all factual inferences therefrom in the light most favorable to the party opposing the motion and all reasonable doubts about the facts should be resolved in favor of the non-movant. See Denney v. City of Albany, 247 F.3d at 1181.

The moving party has the burden to establish the absence of a genuine issue as to any material fact. Adickes v. S.H. Kress & Co., 398 U.S. 144,157 (1970); Allen v. T son Foods Inc.., 121 F.3d at 646. Once the moving party has established that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law, the burden shifts to the non-movant to come forward with a response setting forth "specific facts" showing that there is a genuine issue for trial. Thus, the party opposing summary judgment may not rest upon the mere allegations or denials of the pleadings, but must present sufficient evidence favoring the non-moving party for a jury to return a verdict in favor of that party. Anderson v. Liberty Lobby, Inc., 477 U.S. at 249.

Conclusory allegations will not suffice to create a genuine issue of material facts. See Leigh v. Warner Bros Inc., 212 F.3d 1210,1217 (11th Cir. 2000). There must be more than a scintilla of evidence; there must be "substantial conflict in evidence to support a jury question." Tidewell v. Carter Prods., 135 F.3d 1422, 1425 (11th Cir.1998), quoting Carter v, City of Miami, 870 F.2d 578, 581 (11th Cir.1989). Ultimately, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." Allen v. Tyson Foods, 121 F.3d at 646; accord Denney v. City of Albany, 247 F.3d at 1181.

2. Fair Labor Standards Act ("FLSA" .

The Fair Labor Standards Act ("FLSA") provides workers with certain protections including making it unlawful to violate the minimum wage overtime and record keeping provisions. The FLSA

requires that covered employees must be paid one-and-one-half times their regular hourly rate for hours worked in excess of forty hours per week. 29 U.S.C. § 207. However, there are several exceptions to this including an exemption for agriculture. 29 U.S.C. § 213. Agriculture is defined in 29 U.S.C. § 203 (f) to include "farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 1141j(g) of Title 12),. . . performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market." (emphasis added).

In 1949 the Supreme Court examined this definition of agriculture and identified two different types of agricultural activities that qualify for the exemption- primary and secondary. Farmers Reservoir & Irrigation Co. v. McComb, 337 U.S. 755 (1949). Primary agriculture includes cultivation, tillage of soil, dairying, etc. Id. at 762. Secondary agriculture "includes any practices, whether or not themselves farming practices, which are performed either by a farmer or on a farm, incidently to or in conjunction with 'such' farming operations." Id. at 762, 763.

3. Delivering fuel on a farm, is an exempt secondary agricultural activity under the FLSA.

It is undisputed that ALL of Sariol's work took place on property being farmed by Sugar Farms. During the last three years of his career, Sariol was a service truck operator who delivered fuel to farming

equipment spread throughout different regions of Sugar Farms. (Sariol Aff.; J. Fernandez Depo; Ulloa Depo). Sariol never left the farm for work; all of his job responsibilities were located on farm property. (Sariol Aff.; J. Fernandez Depo; Ulloa Depo). Even the fuel he used was located on Sugar Farms' property. (Ulloa Depo. pp 39, 45). The sole purpose of Sariol's job was to provide fuel and maintenance to farming equipment to insure that the farming operations/harvesting continued.

Secondary agriculture includes activities that are incidental to or in conjunction with farming operations as long as they are performed by a farmer or on a farm.[3] McComb, 337 U.S. at 763. Over the years, the case law concerning what constitutes secondary agriculture has evolved and provides many examples of necessary activities incidental to farming that fall under this FLSA exemption, including transporting field workers and supplies, packaging and delivering farming products to the shipping department located on a farm, servicing equipment located on the farm, cooking for field workers, and even clerical work if incidental to farming and performed on the farm. See Maneja v. Waialua Agricultural Co., 349 U.S. 254 (1954); Pacheco v. Whiting Farms Inc., 365 F.3d 1199 (10th Cir. 2004); Brennan v. Sugar Cane Growers Coop. of Fla., 486 F.2d 1006,1007-1011 (5th Cir.1973). All of these activities are necessary to continue the farming operation, just like supplying fuel to equipment. Without providing fuel to the field equipment, the farming activities would be halted, thus making Sariol's task not only in conjunction with or incidental to farming, but absolutely necessary. Consequently, because the scope of Sariol's job is classified as secondary agriculture, it falls within the

agricultural exemption of the FLSA.

4. Providing fuel to independent contractors located on he farm does not defeat the agricultural exemption.

As part of Sariol's daily/weekly duties he provided fuel to contractors' equipment located on Sugar Farms. (Sariol Aff.; Ulloa Depo. pp 38-65; J. Fernandez Depo. pp 3438). The contractors were located on Sugar Farms property and were providing essential farming/agricultural duties including harvesting and fertilizing crops. (Ulloa Depo.; J. Fernandez Depo.). Much time was spent in the depositions sorting out how much of Sariol's time was spent providing fuel and services to Sugar Farms equipment versus the time spent providing fuel to the independent contractors. Both parties seem to agree that it was only a small percent of his time, but either way, the percentage is not relevant because if any of his time is non-exempt, the entire week has lost the exemption status. Skipper v. Superior Dairies Inc., 512 F.2d 409, 411 (5th Cir.1979) citing Hodgson v. Wittenburg, 464 F.2d 1219 (5th Cir.1972) ("The answer to that lies partly in the rule that an employee's performance of both exempt and non-exempt activities during the same week defeats any exemption that would otherwise apply.")

Plaintiff's argument that providing fuel to the independent contractor negates the exemption status for the entire week, would be correct if the act of providing fuel to an independent contractor was a non-exempt duty. However, providing fuel to an independent contractor harvesting on the farm where Sariol was employed was not a non-exempt activity.

Regardless of whether Sariol was providing fuel to the Sugar Farms equipment or the equipment of the independent contractors, all of his duties were secondary agriculture and thus covered by the exemption. The fact that some of the fuel was used by independent contractors does not affect the analysis of whether the tasks performed by Sariol were exempt. All of Sariol's duties fall within the meaning of secondary agriculture and, as discussed in more detail below, it does not matter whether the fuel was for Sugar Farms equipment or that of an independent contractor harvesting on Sugar Farms property.

A review of the applicable provisions of the Code of Federal Regulations clarifies the meaning of "secondary agriculture" in the context of work performed by independent contractors. 29 CFR § 780.129 addresses secondary agriculture and the legislative history which supports this exemption. Secondary agriculture includes practices performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market delivery to storage or to market. "The legislative history makes it plain that this language was particularly included to make certain that independent contractors such as threshers of wheat, who travel around from farm to farm to assist farmers in what is recognized as purely a agricultural task and also to assist a farmer in getting his goods to market in their raw or natural state, should be included within the definition of agricultural employees." 29 CFR § 780.128: See also Bowie v. Gonzalez, 117 F. 2d 11,18 (1st Cir.1941). Thus, Congress intended the work of independent contractors to be exempt assuming it fell into the definition of agriculture. Since farming activities performed by employees of either a farmer or

an independent contractor on a farm are exempt activities, it only makes sense that secondary agricultural work performed on a farm by the farmer's employees, which is incidental to these exempt farming activities, is also exempt. Accordingly, because all of Sariol's tasks were exempt as secondary agricultural activities, and because all activities took place on farm property, it is irrelevant whether the tasks were done in part for a farming contractor, whose activities on that farm were also covered by the agricultural exemption.

Plaintiff also attempts to analogize the case at hand with a case where chickens are sent to the farm of an independent farmer to be cared for, fed, and raised and then several weeks later, when the chickens are grown, they are picked up and taken to be slaughtered. (DE # 90 p 11). Plaintiff cites Baldwin v. Iowa Select Farms, L.P., 6 F.Supp.2d 831 (N.D.Iowa 1998), but the case Plaintiff is factually discussing in his memorandum is Holes Farms Corp. v. NLRB, 517 U.S. 392 (1996). In Holly Farms, chickens were hatched at a farm owned by Holly Farms and then sent to the farms of independent contractors to be raised to full grown. Holly Farms then sent a crew to reclaim the chickens and take them to be slaughtered. Id. at 395. The Court held that the workers that were sent to reclaim the chickens were not covered by an exemption and "Holly Farms does not resume its status as `farmer' with respect to those birds . . .." Id. at 444, 441. The use of independent contractors in Holly Farms is far different then the use of independent contractors at Sugar Farms. In Holly Farms the independent contractor had a completely separate operation carried out on a different farm, owned by a different farmer. Here, the independent contractor came onto Sugar Farms

property to assist in the primary farming operations of Sugar Farms. These cases are in no way akin; thus Holly Farms is not instructive despite Plaintiff's efforts to compare these types of independent contractors.

5. Sugar Farms Co-op qualifies as a farm under FLSA.

Sariol was employed by Sugar Farms Co-op.[4] Plaintiff argues that Sugar Farms Co-op cannot qualify as a "farmer" under the exemption definition of the FLSA. Plaintiff cites Farmers Reservoir & Irrigation Co. v. McComb, 337 U.S. 755 (1949) for the proposition that a Co-op should not be afforded the agricultural exemption. However, the Co-op in McComb was a different type of Co-op, which did not engage in farming activities. In McComb, the employees' non-exempt status had nothing to do with the corporate entity employing them (i.e. the Co-op), rather they were non-exempt because of the work they were performing and the fact that it did not occur on a farm or by a farmer, and was not incidental to farming. The Co-op in McComb was an independent entity, divorced from farming and was a self-contained activity, not incidental to farming. Id. at 768, 769.

Contrary to Plaintiff's position, The Code of Federal Regulations specifically recognizes that certain co-ops qualify as "farmers." The issue is addressed in 29 CFR § 780.133, entitled, "Farmers" cooperative as a "farmer" which provides:

(a) The phrase "by a farmer" covers practices performed either by the farmer himself or by the farmer through his employees. Employees of a farmers' cooperative association, however, are employed not by

the individual farmers who compose its membership or who are its stockholders, but by the cooperative association itself. Cooperative associations whether in the corporate form or not, are distinct, separate entities from the farmers who own or compose them. The work performed by a farmers' cooperative association is not work performed "by a farmer" but for farmers. Therefore, employees of a farmers' cooperative association are not generally engaged in any practices performed "by a farmer" within the meaning of section 3(f) (Farmers Reservoir Co. v. McComb, 337 U.S. 755; Goldberg v. Crowley Ridge Assn., 295 F. 2d 7; McComb v. Puerto Rico Tobacco Marketing Coop Assn., 80 F. Supp. 953,181 F. 2d 697). The legislative history of the Act supports this interpretation. Statutes usually cite farmers' cooperative associations in express terms if it is intended that they be included. The omission of express language from the Fair Labor Standards Act is significant since many unsuccessful attempts were made on the floor of Congress to secure special treatment for such cooperatives.

(b) It Is possible that some farmers' cooperative associations may themselves engage In actual farming operations to an extent and under circumstances sufficient to qualify as a "farmer." In such case, any of their employees who perform practices as an incident to or in conjunction with such farming operations are employed In "agriculture,"

(Emphasis added). It is clear from part (b) that a farmers' cooperative that is engaged in farming can qualify for the exemption. In this case, the undisputed facts establish that Sugar Farms Co-op is engaged in

farming. Therefore, the exemption applies regardless of the fact that Sariol was employed by a cooperative association because this particular cooperative was engaged in farming.

Plaintiff's alternative argument is that Sugar Farms is brokering sugar cane from other growers and is not actually engaged in farming. Plaintiff appears to have reached this conclusion by misinterpreting deposition testimony. "There is substantial record evidence showing that the sugar cane stock utilized by Sugar Farms was grown bother [sic] other farmers. The cane that is planted by Sugar Farms Co-op is already fully grown when it is planted." (DE # 90 p 22). Plaintiff cites the deposition of Alexander Funjul as his source for believing that Sugar Farms is doing nothing more then replanting fully grown stocks only to cut them down and harvest them. However, Plaintiff has misconstrued the deposition testimony of Funjul. The testimony of Funjul establishes that fully grown sugar cane was used to create seedlings by cutting it into small pieces and then the "seedlings" were planted and a year later the sugar cane was fully grown. (Funjul Depo. pp 44-55).[5] Plaintiff's argument that Sugar Farms planted fully grown sugar cane stalks only to cut them down again is nonsensical and contrary to the deposition testimony.

Plaintiff compares his confused example of planting fully grown sugar cane to Adkins v. Mid-American Growers Inc., 167 F.3d 355 (7th Cir.1999), where Mid-American bought fully grown plants and resold them without performing any agricultural work on those. The Court held, "[w]hen Mid-American buys plants and then resells them without doing significant agricultural work it is operating as a wholesaler rather than as a grower, and wholesalers of agricultural

commodities are not exempt from the Act." Id. at 357. But Mid-American also discussed two other classifications of plants where work associated with such plants would be covered by the agricultural exemption. First, plants that were "grown from scratch," as in from seeds, bulbs, cuttings, or starter plants were "uncontroversially within the exemption." Id. Second, the exemption applied to plants that went through "acclimatization." This is a process in which fully grown plants are purchased from a different climate and must be put in a greenhouse prior to sale under reduced levels of light, temperature, and humidity, and must be fertilized in order to transition into a different environment. Id. The acclimatization process takes between two and six weeks. Id. To the extent that Mid-American is analogous to this case, Sugar Farms Co-op's farming activities are closest to the plants "grown from scratch." Sugar Farms used the fully grown stalks that it purchased to create seeds by cutting them into small pieces. Then Sugar Farms planted the seeds and grew the sugar cane "from scratch," which included watering it, fertilizing it, managing pest control, and then a year later, when the cane was ready, harvesting it for delivery to a mill. Sugar Farms Co-op was not in the wholesale or brokering business. Thus, even under the rationale of MidAmerican, Sugar Farms was engaged in farming within the meaning of the agricultural exemption.

CONCLUSION

In sum, the undisputed material facts establish that Mr. Sariol worked for Sugar Farms Co-op supplying fuel to equipment located throughout Sugar Farms. All of his activities took place on Sugar Farms

and were incidental to and necessary for farming. All of Sariol's duties were covered by the agricultural exemption regardless of whether the fuel was provided to Sugar Farms equipment or that of independent contractors performing farming functions on Sugar Farms property. The fact that Sugar Farms is organized as a Co-op does not alter or effect the exemption status.

Therefore, after reviewing the record, it is hereby

ORDERED AND ADJUDGED that the Motion by Defendant Sugar Farms Co-op For Summary Judgment (DE # 71, filed 1/16104) and the Motion by Defendants Florida Crystals Corporation and Florida Crystals Food Corporation For Summary Judgment (DE # 74, filed 1/16104), are GRANTED. It is further

ORDERED AND ADJUDGED that Plaintiff's Motion For Summary Judgment Against Sugar Farms Co-op and Florida Crystals Corporation (DE # 88, filed 8/05104) is DENIED. It is further

ORDERED AND ADJUDGED Plaintiff's Motion To Set Jury Trial (DE # 103, filed 11/30105) is DEEMED MOOT.

DONE AND ORDERED at Miami, Florida, this 27th day of January, 2006.

ANDREA M. SIMONTON
UNITED STATES MAGISTRATE JUDGE

Footnotes

1 The deponent's name is spelled "Funjul" on the cover of the deposition transcript; however, the deponent spelled his name "Fanjul" at the commencement of the

deposition. (Funjul Depo. p. 3).

2 Sugar Farms also harvested rice but most of the testimony is focused on the sugar cane production.

3 If Sariol's activities did not ALL take place on the farm property, a more lengthy analysis would be necessary, however, that is not the case here.

4 Although there appears to be a complex corporate structure involving numerous companies centered around Florida Crystals Corporation, it is unnecessary to resolve these issues for the granting of summary judgment. Analyzing the corporate structure so as to impute liability to these other companies is not necessary because Sariol's employment was covered by the agricultural exemption in the FLSA, and thus it does not matter whether Florida Crystals Corporation and Florida Crystals Food Corporation are "employers" within the meaning of FLSA.

5 The amount of fully grown sugar cane that is purchased to make seeds is minimal and is purchased for the purpose of creating and growing new types of sugar cane. (Funjul Depo. p 45).